93-1895

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

RYAN THOMAS, a minor by Roberta Thomas and Ronald C. Thomas, Jr., his natural parents and guardians,

Petitioner,

v.

PAUL D. ZUBRITZKY and The Upjohn Company and Merrell Dow Pharmaceuticals, Inc.,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM DAVID GEIGER, ESQUIRE
Counsel of Record
DAVID S. SMITH, ESQUIRE
DAVIES, MCFARLAND & CARROLL, P.C.
One Gateway Center, Tenth Floor
Pittsburgh, PA 15222
(412) 338-4712

Counsel for Respondent Paul M. Zubritzky, M.D., incorrectly designated by Petitioner as Paul D. Zubritzky

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioner may have the Supreme Court of the United States determine if a state court in a common law tort action had properly granted a Motion for Summary Judgment against him pursuant to that state's Rules of Civil Procedure by ruling Petitioner had failed to raise any genuine issue of material fact in opposition to the Motion.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 1

COUNTER-STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

I. PETITIONER HAS NOT PREVIOUSLY RAISED THE FEDERAL QUESTIONS HE NOW SEEKS TO HAVE REVIEWED 5

II. THE PETITION DOES NOT PRESENT A FEDERAL QUESTION 8

III. THE DECISION OF THE SUPERIOR COURT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS 10

IV. THE PETITION IS PATENTLY FRIVOLOUS .. 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Bankers Life & Casualty Company v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed. 2d 62 (1988) 6

International Longshoreman's Association v. Davis, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed 2d 389 (1986) 10

Minneapolis & S.L.R.R. Co. v. Bumbolis, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed 961 (1916) 10

Schroeder v. New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed 2d 255 (1962) 9, 10

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed. 2d 392 (1981) 6, 7

STATUTES AND RULES

U.S. Constitution, Amendment VII 10

28 U.S.C. § 1257(a) 2

Sup. Ct. R. 29.5 5

Sup. Ct. R. 42.2 12

Pa.R.A.P. 1115(a)(3) 8

Pa.R.A.P. 2116(a) 8

No. _____

In The

Supreme Court of the United States

October Term, 1993

RYAN THOMAS, a minor by Roberta Thomas and Ronald C. Thomas, Jr., his natural parents and guardians,

Petitioner,

v.

PAUL D. ZUBRITZKY and The Upjohn Company and Merrell Dow Pharmaceuticals, Inc.,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Paul M. Zubritzky, M.D., incorrectly designated as Paul D. Zubritzky by the Petitioner, one of the Respondents, respectfully opposes the Petitioner's Petition for a Writ of Certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

JURISDICTION

Respondent Zubritzky disagrees that this Honorable Court has appellate jurisdiction over this case pursuant to

28 USC § 1257(a). No federal question was raised or decided in any state court below.

COUNTER-STATEMENT OF THE CASE

Respondent Zubritzky elects not to correct inaccuracies or omissions in Subpart A of Petitioner's Statement of the Case, labeled "Case History – Factual Background", as the statements made therein are not material to the consideration of the questions actually presented by the Petition. However, fundamental inaccuracies and omissions have been made in Subpart B of Petitioner's Statement of the Case, labeled "Proceedings Below – Summary Judgment Record".

Respondents The Upjohn Company (Upjohn) and Merrell Dow Pharmaceuticals, Inc. (Merrell Dow) filed Motions for Summary Judgment in this matter on August 12, 1991. Petitioner filed a Memorandum in Opposition to the Upjohn and Merrell Dow summary judgment motions on August 29, 1991. Petitioner's Memorandum merely stated that their Motions should not be granted because "a material question of fact exists". Petitioner supported this assertion by a broad reference to "vast amounts of literature" purportedly linking these Respondents' drugs with his birth defects and by attaching the January 2, 1986 letter of Allen S. Goldman, M.D., as an exhibit. Dr. Goldman's letter is attached to Petitioner's Petition as Exhibit "A" at Appendix F, pp. 34a-36a. These Motions for Summary Judgment were argued on September 19, 1991; an Order granting both Motions was entered later that day.

On September 30, 1991, the trial court entered an Order clarifying and affirming its earlier Orders granting summary judgment in favor of Upjohn and Merrell Dow. Respondent Zubritzky filed a Motion for Summary Judgment on October 9, 1991, on the grounds that the Petitioner was precluded from further litigating the question of causation under the principles of direct and collateral estoppel by reason of the judgments entered in favor of Upjohn and Merrell Dow. Respondent Zubritzky's Motion was granted on October 17, 1991. Petitioner had not filed a response to this Motion by the time the Order granting it had been entered.

After the trial court had granted the summary judgment motions of Upjohn and Merrell Dow and after the trial court had granted the summary judgment motion of Dr. Zubritzky, Petitioner filed responses to these Motions which had attached to them copies of additional letters by Dr. Goldman and a copy of a letter by David Abramson, M.D. Copies of these letters are attached to Petitioner's Petition as Exhibits "B" through "D" at Appendix F.

In his appeal to the Pennsylvania Superior Court from the trial court Orders granting summary judgment for the Respondents, Petitioner raised two questions:

> 1. Whether material issues of fact exist concerning the causal connection between the additional defendant, The Upjohn Company's drug, Provera, and the minor-plaintiff's injuries?
>
> 2. Whether the adequacy of additional defendant, The Upjohn Company's warning is a question for a fact finder or could be determined as a matter of law?

Brief for [Petitioner], p. vi.

The Superior Court answered both of these questions in the negative:

> Because [Petitioner] offered nothing more than the conclusory opinions of their expert which were unsupported by any specific facts or other adequate grounds, we conclude that they failed to establish a disputed issue of fact regarding Provera as the cause of Ryan's birth defects.

Memorandum Opinion of the Superior Court at Appendix C of Petitioner's Petition (referred to hereafter as "Petition Appendix C"), p. 19a. Rather than having "recognized and accepted" the January 2, 1986 letter by Dr. Goldman in its Memorandum Opinion, the Superior Court acknowledged it as the only statement by an expert medical witness to have been timely filed on behalf of the Petitioner in response to any of the Respondents' summary judgment motions. Petition Appendix C, p. 14a. The Superior Court dismissed this letter as "inadequate" because it offered conclusions without the factual basis and grounds upon which those conclusions rested, and it did not attempt to respond to factual issues raised by Upjohn in its Motion. Petition Appendix C, p. 18a.

Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania re-stated the two questions Petitioner had raised in his appeal to the Superior Court, and added a third which asked "whether the Superior Court erred in upholding the entry of summary judgment in favor of [Dr. Zubritzky and Upjohn]." Petition for Allowance of Appeal, p. 1. In making his argument in support of his Petition for Allowance of Appeal, Petitioner claimed "the Superior Court has decided a question of substance in a manner not in accord with and

contrary to applicable decisions of the Supreme Court of Pennsylvania and the Supreme Court of the United States." However, nowhere in this Petition did Petitioner describe how the Superior Court's decision was contrary to, much less identify, any of these "applicable decisions". The Supreme Court of Pennsylvania denied the Petition on February 14, 1994. Respondent Zubritzky does not know whether this Petition for a Writ of Certiorari has been timely filed, as Petitioner has not served notice of the filing pursuant to Sup.Ct.R. 29.5.

REASONS FOR DENYING THE PETITION

Even if Petitioner has now presented a federal question for review by an appellate court, he clearly had not previously raised such a question before any court below. In fact, Petitioner has not presented a federal question or one worthy of review by the Supreme Court of the United States. The Petition filed by Petitioner's counsel of record exhibits a conscious disregard of the rules of law and procedure governing the proper presentation of a Petition for a Writ of Certiorari.

I. PETITIONER HAS NOT PREVIOUSLY RAISED THE FEDERAL QUESTIONS HE NOW SEEKS TO HAVE REVIEWED.

For reasons of comity to the States and such practical considerations as the need for a properly developed record on appeal, this Court has repeatedly refused to exercise jurisdiction over federal questions "not pressed

or passed upon below". See *Bankers Life & Casualty Company v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed. 2d 62 (1988); *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed. 2d 392 (1981).

In *Bankers Life & Casualty Company, supra*, the Appellant contended it had challenged an award of punitive damages against it as a violation of the Due Process Clause and the Contract Clause. 486 U.S. at 76, 100 L.Ed. 2d at 71. In fact, the Petition for Re-hearing Appellant filed with the Mississippi Supreme Court alleged only that this award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." *Id.* The Court ruled that "[a] party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Id.*

In *Webb v. Webb, supra*, this Court explained:

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

451 U.S. at 496, 68 L.Ed. 2d at 397. The Appellant in that case had contended she had adequately raised a federal question regarding application of the Full Faith and Credit Clause by stating in her brief to the state court below, the Georgia Supreme Court, that:

> "In such circumstances, Appellant asserts, the decree entered in Florida should have been recognized as a final order subject to full faith and credit."

451 U.S. at 496, n. 3, 68 L.Ed. 2d at 396. This Court concluded the Appellant's use of the phrase "full faith and credit" was more likely an invocation of a principle of state law. 451 U.S. at 497, 68 L.Ed. 2d at 397. The Court concluded:

> "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law."

451 U.S. at 501, 68 L.Ed. 2d at 400 (emphasis in original). The Court also observed that the Georgia Supreme Court made no mention of any federal issue or question in its opinion in support of the order from which the Petition for a Writ of Certiorari had been made. 451 U.S. at 495, 68 L.Ed. 2d at 396. This Court added it had "frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Id.* (Citation omitted).

Until his passing reference to "applicable decisions of . . . the Supreme Court of the United States" in his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, Petitioner did not cite or refer to any part of or principle under the United States Constitution or federal statute or decision of any federal court in anything he had submitted to any court below with respect to any of the Respondents' Motions for Summary Judgment.

Neither the trial court nor the Superior Court discussed or even recognized – let alone decided – any federal question in their opinions in support of the Orders they have entered in this matter. In fact, a reference to a federal question in the Memorandum Opinion of the Superior Court would have been extraordinary, as that Court would not ordinarily consider anything which had not been set forth in the appellant's statement of questions involved. Pa.R.A.P. 2116(a). No such question was included in Petitioner's statement of questions involved to the Superior Court, either expressly or by implication. Likewise, the Supreme Court of Pennsylvania could not have decided a federal question, as one had not been presented to it among Petitioner's questions presented for review set forth in his Petition for Allowance of Appeal. See Pa.R.A.P. 1115(a)(3).

Petitioner did not raise a federal question in any state court below.

II. THE PETITION DOES NOT PRESENT A FEDERAL QUESTION.

Petitioner apparently conceives a federal question is raised when a state court grants summary judgment against him under a state rule of civil procedure that is similar to the federal rule of civil procedure that governs motions for summary judgment made in Federal Courts. However illuminating the decisions of Federal Courts applying the federal rule to decide what evidence is sufficient to raise a genuine issue of material fact, they have no force of law in state courts deciding the same issue in common law tort actions under state rules of civil

procedure. Petitioner's attempt to wring a federal question out of a juxtaposition of federal and state court decisions applying federal and state rules of civil procedure, respectively, to Motions for Summary Judgment is absurd.

Petitioner also conceives a federal question has been raised by what he has characterized as the state court's "denial" of his constitutional right "to be heard". Respondent Zubritzky wonders whether Petitioner now contends he was denied a meaningful opportunity to contest Respondents' Motions for Summary Judgment, or whether he now contends the entry of summary judgment against him has denied him a constitutional right to a trial by jury. However, the procedural history of this case does not support the procedural due process challenge suggested by the first interpretation, and this Court has ruled conclusively against the second.

Nothing in Petitioner's Statement of the Case suggests he was denied or even has ever thought he was denied a meaningful opportunity to contest any of Respondents' Motions for Summary Judgment. While some question may exist as to whether Petitioner's counsel diligently responded to these Motions, it is clear Petitioner was not compelled to oppose the Motions without adequate time, or the opportunity to seek additional time, to adequately respond to the Motions. See Memorandum Opinion of the Superior Court, Petition Appendix C, p. 12a.

The "right to be heard" which Petitioner claims this Court has identified in *Schroeder v. New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 2d 255 (1962), is the right to receive

"notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 371 U.S. at 211, 9 L.Ed. 2d at 258-59. It is a right of procedural due process; but Petitioner certainly has not claimed he was either unaware of, or otherwise prevented from responding to, any of Respondents' Motions for Summary Judgment.

Perhaps Petitioner now claims the entry of summary judgment against him has violated a constitutional guarantee of a jury trial. While the Seventh Amendment preserves trial by jury in Federal Courts, this right does not apply to a case brought in state court. See *Minneapolis & S.L.R.R. Co. v. Bumbolis*, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916). Petitioner's "right to be heard" mantra notwithstanding, he has failed to raise a justiciable federal question in this case.

III. THE DECISION OF THE SUPERIOR COURT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has acknowledged it has no authority to review state resolutions of issues brought under the state's laws or rules of procedure. See *International Longshoreman's Association v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed. 2d 389 (1986). Petitioner's appeal to the Superior Court from the trial court orders granting summary judgment against him was brought by him and subsequently decided by the Superior Court exclusively under state appellate case law interpreting and applying

state rules of civil procedure. In its Memorandum Opinion in support of its affirmance of the trial court's orders, the Superior Court has clearly shown the granting of summary judgment in favor of the Respondents was well supported under applicable Pennsylvania appellate court decisions construing the relative burdens imposed upon parties making or opposing Motions for Summary Judgment under Pennsylvania Rules of Civil Procedure.

IV. THE PETITION IS PATENTLY FRIVOLOUS.

This Petition is a preposterous attempt by Petitioner's counsel of record to resuscitate a lawsuit that died on September 19, 1991, when the conclusory and unsubstantiated opinion of Petitioner's expert physician carried by a boilerplate Memorandum of Law could not resist the substantial factual, medical and legal arguments advanced by Respondents Upjohn and Merrell Dow in support of their Motions for Summary Judgment. That was Petitioner's "day in court". He lost. Petitioner's counsel of record appealed for him to the Superior Court of Pennsylvania. He lost again. In a well-reasoned opinion, the Superior Court cautioned Petitioner's counsel that his effort to resist Respondents' Motions had been dilatory and half-hearted, at best; but it kindly suggested timely production of the additional expert reports in counsel's possession probably would not have carried the day for his client. His attorney petitioned for allowance of appeal to the Supreme Court of Pennsylvania. He lost a third time.

Now Petitioner's counsel would have this Court review this matter. But to make this Petition, counsel has either consciously disregarded or has completely ignored

the rules and applicable decisions of this Court governing how a Writ of Certiorari shall be sought and when it may be granted. To make this Petition, Petitioner's counsel has disingenuously fashioned a substantial federal question and a record of its review below out of nothing more than a prayer to the Pennsylvania Supreme Court that this Court may once have rendered a decision – had he but looked for it – which would now entitle his client to relief. In the process, counsel for Petitioner has compelled Respondent Zubritzky to incur the considerable expense of preparing and printing this Brief in Opposition to the Petition. Dr. Zubritzky urges this Court use its authority under Rule 42.2 to award him appropriate costs and damages against Petitioner's counsel of record.

CONCLUSION

Respondent Zubritzky respectfully urges this Honorable Court deny the Petition for Writ of Certiorari and order the payment of appropriate costs and damages to him by Petitioner's counsel of record.

Respectfully submitted,

WILLIAM DAVID GEIGER, ESQUIRE
Counsel of Record
DAVID S. SMITH, ESQUIRE
DAVIES, MCFARLAND & CARROLL, P.C.
One Gateway Center, Tenth Floor
Pittsburgh, PA 15222
(412) 338-4712

Counsel for Respondent Paul M. Zubritzky M.D., incorrectly designated by Petitioner as Paul D. Zubritzky